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Smoking and Health Litigation

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ARGENTINA

Fernandez v. Nobleza-Piccardo S.A.I.C.y F. This lawsuit was filed on approximately August 7 or August 8, 1989, in the National Labor Court (a court much like a workers' compensation court in the United States) in Buenos Aires, Argentina, by Jesus Eduardo Fernandez against Nobleza-Piccardo S.A.I.C.y F., which is BAT's subsidiary in Argentina. Fernandez, 60 years old at the time the case was filed, is a former employee of Nobleza and worked in Nobleza's factory as a machine operator from 1975 to 1989. Medical records have indicated that Fernandez made more than 600 requests for medical assistance during the 13 years that he worked for Nobleza. Fernandez claims that he is suffering from atherosclerosis or obstruction of some peripheral blood vessels as a result of exposure to environmental tobacco smoke. Fernandez claims damages of 355,686.70 Australs as of December 31, 1988.

Discovery hearings were to be held on December 14 and 18 but no report is yet available as to whether the hearings were held as scheduled. Witnesses for both plaintiff and defendant were to be called during these hearings. Plaintiff was to call two of his co-workers, while Nobleza was to call the Chief of its Medical Services department and one of the company's engineers. Additional discovery hearings are presently scheduled to be held on February 28 and March 8, 1991.

Lidia Nanci Chauque and Miriam Liliana Alarcon v. Juan Manual Figueroa, Leopoldo Figueroa and Marcela Figueroa de Lee (Chauque, et al., v. Figueroa, et al.). This lawsuit was filed in February of 1989 in the Labor Court in the province of JuJuy in northern Argentina by the widow and daughter of Antenor Alarcon against the heirs of Figueroa Campero. Figueroa Campero was the lessee of the tobacco farm where Mr. Alarcon allegedly worked in all stages of tobacco production from early 1975 until his death on December 29, 1986. Plaintiffs allege that Mr. Alarcon's illness (lung fibrosis,

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edema and other lung diseases) was caused by his exposure to pesticides, carbon dioxide and "tar" of tobacco leaves inhaled while working on defendants' property.

Plaintiffs' claim, which is for damages caused by the death of Mr. Alarcon, is estimated at 240,000 Australs for actual damages and 45,000 Australs for "moral damages" as of the date of the complaint.

Plaintiffs have sued under the general tort and contract rules of Argentina. Defendants have filed a Statement of Defense claiming the suit should be dismissed under the statute of limitations and by reason of lack of causation. Evidence has not yet been submitted.

No change.

AUSTRALIA

Australia Federation of Consumer Organizations Inc. (AFCO) v. Tobacco Institute of Australia Ltd. (TIA). In July 1986, TIA ran an ad concerning environmental tobacco smoke entitled "From Those Who Do ... To Those Who Don't." The ad stated in part that "... there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers." The ad went on to discuss certain scientific studies, quoting from some. The Australian Trade Practices Commission (TPC) challenged the ad as misleading and deceptive. After discussions with TPC, TIA ran a "follow-up ad" and TPC informed TIA that, as a result, it considered the matter closed. Subsequently, AFCO, a private organization, filed suit seeking an order prohibiting TIA from running the original ad or similar ads in the future.

No change. TIA has not yet submitted its written reply to AFCO's concluding submissions but is still expected to do so in the immediate future.

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The judge, who has reportedly written 200 pages of the decision, is expected to render it in mid-February.

Denis Daniel Gallagher v. CSR Ltd. and Midalco Pty. Ltd. v. W.D. & H.O. Wills, Ltd. (BAT affiliate) and Rothmans of Pall Mall Ltd. on October 26, 1990, the asbestos defendants filed a third-party petition that brought the tobacco defendants into the case. Injured party Denis Daniel Gallagher, who filed suit against the asbestos defendants on August 23, 1990, claims he has lung cancer, asbestosis and pleural disease. Mr. Gallagher was allegedly exposed to asbestos for only a limited time, between May and December of 1961 when he worked as a plumber for a predecessor corporation of defendant Midalco. The asbestos defendants claim the tobacco companies are responsible for his injuries because Mr. Gallagher smoked between 1942 and 1955 and again from 1960 to 1990. He smoked a loose-leaf, roll-your-own brand of tobacco (Champion Ruby) and at least two brands of manufactured cigarettes (Rothmans and Winfield Blue). Plaintiff seeks an unspecified dollar amount in actual and special damages. The trial court in Gallagher is the Supreme Court of Western Australia. The case is being heard in Perth.

Several developments have taken place recently. Rothmans sued the entities controlling three of the hospitals that provided medical care to Mr. Gallagher to enable medical records to be secured. On December 13, Mr. Gallagher responded to written "Proof of Evidence" questions, which are similar to interrogatories in the United States. Evidence was taken from Mr. Gallagher on December 14, 17 and 18. These proceedings are videotaped and presided over by the judge, and will constitute his trial testimony even if he survives to trial. A hearing is scheduled for January 18 on a variety of issues. At that time, the judge is expected to rule on the tobacco defendants' severance motion, on disputes over discovery from third parties, and on the exchange

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of expert reports. If the severance motion is granted, trial between plaintiff and the asbestos defendants is expected to begin shortly after January 18; if the asbestos defendants lose the trial, a "contribution action" would be held against the tobacco defendants at some time during 1991. Plaintiff's counsel has indicated he will "vigorously support" our severance motion.

CANADA

Imperial Tobacco Ltd. v. Attorney General of Canada and RJR-MacDonald v. Attorney General of Canada. While not technically consolidated, these actions are being tried concurrently in the same court. These cases, challenging the constitutionality of Canada's Tobacco Products Control Act, were filed on August 31, 1988, and September 1, 1988, respectively, in the Superior Court, Province of Quebec, District of Montreal. The companies are arguing that the Act, which prohibits all forms of advertising and promotion of Canadian tobacco products, infringes the right to free speech.

Trial began on September 25, 1989. On December 13, the Quebec Court of Appeal granted the government leave to appeal certain issues but refused the Attorney General's request to stay the trial pending appeal. The appeal was heard on February 16, and the court directed the parties to brief the issue during March. Following the lengthy Christmas holiday recess, trial resumed on February 19. The Attorney General, which began its case by presenting the testimony of several medical expert witnesses, also called witnesses such as Jeffrey Harris, Joel Cohen and Richard Pollay, all of whom testified for plaintiff in Cipollone. During May, Imperial withdrew its challenge to the confidentiality of certain government documents. At the same time, the government abandoned its appeal of certain evidentiary issues.

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After another hiatus, the trial resumed on June 5 with the cross-examination of Jeffrey Harris. The government also called several rebuttal witnesses, including the Canadian representative to the World Health Organization, an official of the Department of Health and Welfare, and the publisher of the Toronto Globe & Mail. The rebuttal case was concluded on June 21. Oral arguments were presented during September and October, and were concluded on October 22.

No change. Judge Chabot is still expected to render judgment by the end of the year.

Perron v. RJR-MacDonald, Inc. This case was filed in June of 1988 in British Columbia. Perron allegedly suffers from Buerger's Disease, which resulted in the amputation of both of his legs. Perron claims to have smoked RJR-MacDonald's Export cigarettes from 1965 (age 12) until 1983. No dollar amount of damages is specified in the complaint.

On May 29, 1990, a consent order was entered by the court that bifurcates trial in the case, and the statute of limitations will be the only issue before the court during a first trial. The consent order also specifies that the statute of limitations trial will be heard by a judge and not a jury. Discovery is to be limited at the present time to statute of limitations questions. A trial date on the balance of the issues in plaintiff's complaint will not be set until the statute of limitations trial, and any subsequent appeal, are concluded. Any trial on the remaining issues will be before both a judge and jury.

No change.

Rothmans, Benson & Hedges Inc. v. Attorney General of Canada. On July 20, 1988, Rothmans filed this case challenging the constitutionality of Canada's Tobacco Products Control Act. Unlike the RJR-MacDonald and Imperial cases, which are filed in

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"state" court in Montreal, this case was filed in "federal" court. Like the other two cases, the RBH lawsuit argues that the Act infringes the right to free speech.

No change.

FINLAND

Aho v. Suomen Tupakka (BAT subsidiary) and Oy Rettig Ab (RJR licensee). This case was filed in April 1988 and is pending in the City Court of Helsinki. Mr. Aho allegedly developed lung cancer, laryngeal cancer, emphysema and chronic bronchitis as a result of smoking Rettig's Klubi cigarettes from 1941 until 1966 and Suomen's North State brand from 1966 until 1986.

A hearing was held on December 13 during which defendants called Hans Eysenck, William Ober and Hiram Langston. Another hearing is scheduled for January 31, and defendants are tentatively scheduled to call the following witnesses: Arthur Furst, Sheldon Sommers and Professor Kari Syrjanen.

NETHERLANDS

Stichting Sigaretten Industry (The Cigarette Industry Foundation) v. Stichting Volksgezondheid en Roken ("StiVoRo") (The Public Health and Smoking Foundation). In October 1987, the Public Health and Smoking Foundation (Stichting Volksgezondheid en Roken -- "StiVoRo") published advertisements claiming that environmental tobacco smoke is "unhealthy" for non-smokers. In December 1987, a lawsuit was filed in the District Court of the Hague on behalf of the 14 tobacco companies (including Philip Morris) doing business in the Netherlands, claiming that various aspects of the ads were inaccurate and seeking an order prohibiting StiVoRo

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from making statements which suggest that environmental tobacco smoke is harmful.

See my interim report of November 1 on the court's October 31 ruling. A hearing was to be held on the decision on December 18, although agreement had been reached among the parties for a continuance.

NORTHERN IRELAND

Dean v. Gallaher. This Buerger's Disease case was filed on August 22, 1988. Mr. Dean is in his mid-30's and claims to have smoked 20 to 30 cigarettes per day of an unknown Gallaher brand. He allegedly began smoking in 1968 and, in January of 1986, underwent a bypass operation on his femoral artery that extended from his groin to his mid-calf.

On August 7, 1989, plaintiff filed his Statement of Claim, which alleges, among other things, that plaintiff was addicted, and that Gallaher: caused consumers to believe there was no risk in smoking; failed to adequately moderate or reduce promotion campaigns; failed to provide information to the public about dangers associated with smoking; used misleading advertising; failed to warn of the risk to smokers of developing Buerger's Disease; failed to research the effects of smoking, including addiction; minimized the evidence that smoking was dangerous; and failed to provide adequate treatment to those addicted to smoking.

No change.

Jean Brennan v. Gallaher. On October 12, 1990, plaintiff Jean Brennan filed a writ of summons against Gallaher that alleges she sustained personal injuries in connection with her employment. Ms. Brennan worked for Gallaher between 1943 and 1950, and she claims Gallaher provided her cigarettes during that time. No injury is specified in the

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summons, but it is expected that she will claim she has Buerger's Disease. Her counsel are not the ones who represent plaintiff in Dean.

By statute, plaintiff has six weeks in which to file a Statement of Claim. This requirement is routinely waived, and plaintiff may elect to wait for some time before filing a Statement (plaintiff in Dean waited approximately one year after filing a writ to file his Statement, but the document was accepted).

No change.

PHILIPPINES

Jardeleza, et al. v. R.J. Reynolds Tobacco Co., Philip Morris Inc., et al. Plaintiffs seek an injunction barring cigarette advertising and an order requiring the companies to place warnings on cigarette packages. Plaintiffs also ask that the defendants be required to forfeit the amounts of their respective advertising budgets.

No change.

Zamora v. Fortune Tobacco Corp. This Buerger's Disease case was filed November 26, 1988, in the Regional Trial Court of Quezon City. The plaintiff allegedly smoked Champion brand cigarettes from 1965 until 1970 and Hope brand cigarettes from 1970 until 1986. Fortune is an RJR licensee but Champion and Hope are not Reynolds brands.

Fortune's motion to dismiss based on the statute of limitations was granted on June 29, 1989. Plaintiff's appeal of the June 29, 1989, order has been docketed by the Philippine Court of Appeals.

During October, the Court of Appeals issued an order to show cause why the case should not be dismissed within ten days due to plaintiff's failure

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to file an appeal brief. To our knowledge, plaintiff has not responded but the court has also not issued an order dismissing the appeal. (Reports on this case have reportedly been delayed due to very slow mail service in the Philippines.)

THREATENED LITIGATION

ENGLAND

Booth v. Gallaher. Gallaher has received a demand letter from a former pipe smoker named Booth who claims he has tongue cancer.

No case has been filed.

JAPAN

An anti-smoking group, known as the Lawyer's Organization for Nonsmoker's Rights, has been formed in Japan and has announced that a smoking and health product liability case would be filed against JTI in 1990. The case apparently will be brought on behalf of a smoker who claims to have laryngeal cancer caused by smoking.

No case has yet been filed.

SWITZERLAND

Eberle v. F.J. Burrus. In December 1988, Walter Eberle, who claims he has lung cancer, submitted a formal demand for payment to Swiss cigarette manufacturer F.J. Burrus. Little information on Mr. Eberle is available, although he has alleged he smoked Parisienne brand cigarettes from 1953 to 1987. He had one year from the date he submitted his demand for payment to file his claim.

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On December 7, 1989, Mr. Eberle served a second demand for payment, which tolls for another year the statute of limitations on his claim. It is not yet known if Mr. Eberle filed any materials with the court by December 7, 1990.

UNITED STATES LITIGATION

Since the last report, no cigarette smoking and health cases were filed and one was dismissed. Philip Morris was not a defendant in the case that was dismissed. At the present time, 52 product liability cases are pending in the United States against cigarette manufacturers. Philip Morris is a defendant in 26 of those 52 cases.

Two important deadlines will take place in the immediate future. December 24 is the date by which Brown & Williamson may file a petition for writ of certiorari with the United States Supreme Court that seeks review of the New Jersey Supreme Court's July 26 Dewey decision. December 28 is the date by which plaintiff in Cipollone may file a petition for writ of certiorari seeking review of the Third Circuit's 1990 rulings. Neither Brown & Williamson nor plaintiff in Cipollone have indicated whether petitions will be filed.

Trial in Cipollone remains scheduled to begin on January 7, 1991. Since the last report, plaintiff received a thirty-day extension in which to file a petition for writ of certiorari with the United States Supreme Court. If a petition is filed by the December 28 deadline, the trial date will be vacated. A conference before Judge Sarokin to discuss the trial date is scheduled to be held on December 21. Plaintiff's appeals from two orders by the Magistrate are now before Judge Sarokin. Plaintiff has asked Judge Sarokin to review the order disqualifying the Wilentz, Goldman & Spitzer firm and the order that allowed defendants to take the deposition of Dr. Jeffrey Harris, perhaps

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plaintiff's most significant expert witness, on his opinions on causation.

Haines, the other case before Judge Sarokin in federal court in New Jersey, is still set for trial on September 25, 1991; Philip Morris is one of the defendants in the case. Additional pre-trial deadlines, most of which are contingent on Cipollone being stayed due to the appeal to the Supreme Court, have also been set. A Special Master will begin review of certain company documents during 1991.

The Indiana and Pennsylvania Supreme Courts have yet to rule on whether they will accept review of preemption rulings from intermediate state appellate courts in the Yvonne Rogers and Hite cases, respectively. (Other issues are also before the Rogers court.) The preemption issue went before the Louisiana Supreme Court on December 14 when plaintiff noticed an appeal from the November 14 decision by the Court of Appeals. That Court has also not ruled on whether it will accept the petition.

On December 13, the Minnesota Court of Appeals reversed, in part, the trial court's order granting R.J. Reynolds' motion for summary judgment which dismissed all of plaintiff's claims. The Court of Appeals said that plaintiff should be allowed to conduct discovery on the "true" design defect claim referring to the design of Reynolds' "Premier" cigarette. Previously, the Minnesota Supreme Court had dismissed plaintiff's post-1965 failure to warn claims based on preemption. The Court of Appeals' decision leaves standing: 1) the trial court's dismissal of plaintiff's pre-1966 failure to warn claim based on Comment (i) of § 402(a) of the Restatement (Second) of Torts; 2) a claim of intentional misrepresentation through cigarette advertising and promotion, both before and after 1966; 3) claims of breach of express warranty both before and after 1966; and 4) risk-utility claims

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based upon the inherent dangers of ordinary cigarettes.

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